SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 640

FLORENCE J. BAILEY, AS ADMINISTRATRIX OF BERNARD E. BAILEY,

Petitioner,

vs.

CENTRAL VERMONT RAILWAY, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

RESPONDENT'S BRIEF.

HORACE H. POWERS,
Counsel for Respondent.

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Statement of the Case.[1]

Respondent has little criticism of the statement of facts compiled by Petitioner except: (1) for an inaccuracy which will be called to the Court's attention, and (2) that there are other important facts which should have the Court's attention.

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[1] Since the Court ordered that the transcript of testimony need not be printed, references are made to pages of the typewritten Transcript.

The Petitioner says:

> "Intestate was unfamiliar with the method of operating a hopper car. * * * He had never been instructed in the use of any wrench for this purpose."

The Record does not bear out these two statements. It is true that none of the witnesses examined had ever seen Petitioner's intestate open a hopper car but it is equally true that the decedent had had ample opportunity to observe the operation on many occasions. (Tr. 67, 69, 74) He was a bright young man and must be charged with the education thus presented to him in the use of a frog wrench for this purpose. Furthermore, Section Foreman Stone, who qualified as an expert in the use of a wrench for this purpose, (Tr. 48), and who stood right beside the decedent when he attempted to open this hopper car (Tr. 34, 47), says that the decedent required no prompting or instruction what to do. (Tr. 47-48) Stone says further that the decedent seemed perfectly familiar with the use of the wrench for this purpose, handled the wrench without awkwardness (Tr. 47) and did the job perfectly. (Tr. 48) In the face of this undisputed testimony, we respectfully submit that the Record does not admit the conclusion that intestate was unfamiliar with the method of operating hopper cars.

The statement that intestate had never been instructed in the use of the wrench is equally unjustified. It is admitted that he received the instruction of watching the operation performed on many occasions, (Tr. 67, 69, 74), and it is admitted that he was warned by Section Foremen Stone before he started to do this work. (Tr. 35) It is further admitted that he acknowledged the warning to be careful by saying "I will", or "Yes" or something like that. (Tr. 40) There is, therefore, a complete failure of proof on the issue of lack of instruction.

In fairness to the Court, we respectfully add to the Petitioner's statement of facts the following undisputed facts which we consider of vital importance.

Decedent was a young man between twenty-four and twenty-five years old (Tr. 63) who had worked for defendant as a sectionman for about five years. (Tr. 61 and 73) On the day in question, the Montpelier gang, the Williston gang and the Richmond gang were assembled at Montpelier Junction to work with the work train at different points between Montpelier and Williston. The train consisted of an engine, caboose, several cars containing track material and a car of cinders. (Tr. 12-13, 54-55) The work train with the three section crews left Montpelier Junction between 7.30 and 8.00 o'clock in the morning. (Tr. 55) The train proceeded along toward Williston, stopping to permit the men to do the work assigned to them. This work consisted of unloading steel along the right of way, which means the unloading of material such as rails, tie plates and the like along the right of way. (Tr. 12, 55) Some time between four and five o'clock that afternoon, the crews finished their labors of the unloading of track material from the cars and took up the disposition of the car of cinders which was in the train. (Tr. 13, 55, 101-102)

The bridge in question, known as Bridge 85, is as long as the cattlepass beneath it is wide, as will be seen from Defendant's Exhibits A, C, D and E. It consists of a bridge floor resting on stone abutments upon which floor are laid the rails over which the trains operate. On either side of the bridge are stringers upon which the sectionmen stand to work without being crowded by the overhang of the cars, (Exhibit A) and extending beyond the stringers are the ends of the ties which are laid crossways of the bridge. (Tr. 28) Some 18 feet below the bridge is a cattlepass through which the farmer drives his cattle from one side of the track to the other. (Tr. 14, 128)

On the day of the accident, after the cinder car had been spotted on the bridge, decedent walked over to Sectionman Muir. Muir had just got off from a motor car, some distance from the bridge, and had a long handled frog wrench in one hand and a shovel in the other. (Tr. 96, 98) The decedent came up to him and asked Muir for the wrench, (Tr. 96-97, 99) The decedent said to Muir, "I will take the wrench". (Tr. 96) Muir gave the decedent the wrench. (Tr. 97) The decedent did not explain to Muir why he wanted the wrench nor did Muir ask the decedent to take the wrench or order him to take it. (Tr. 99) Muir was not the decedent's boss and had no authority over him. (Tr. 99)

The decedent took the wrench and walked onto the bridge. (Tr. 34) Section Foreman Stone was standing on the bridge waiting to help whoever came to open the hopper. (Tr. 34) Stone was not Bailey's boss and had no authority over him. (Tr. 33, 38) Stone did not order decedent to get the wrench nor to open the hopper. (Tr. 58) In fact, Stone did not know who the decedent was and had never seen him before until that time. (Tr. 33) The decedent was a member of the gang whose boss was Morello. (Tr. 61) Section Foreman Morello, the decedent's boss, was not present at the scene of the accident that day. (Tr. 63)

After the decedent came on the bridge with the wrench, the decedent fitted the wrench to the nut on the end of the shaft of the car and released the dog. (Tr. 36, 53) Section Foreman Stone did not instruct him to do this and had no right to do so. (Tr. 38) While the decedent was fitting the wrench to the nut, Section Foreman Stone cautioned the decedent to be careful. Stone said to the decedent, "Be careful the wrench does not catch you". (Tr. 35) The decedent answered "I will", or "Yes" or something like that. (Tr. 40) The response was such that Section Foreman Stone knew his warning had been heard and

understood by the decedent. (Tr. 40) This conversation between Stone and the decedent was overheard by Muir, (Tr. 99) and by Section Foreman Fumagalli. (Tr. 135-136) Thereupon the decedent pulled the wrench back, which released the tension from the dog and Stone released the dog. (Tr. 36, 53) At this point, decedent fell from the bridge. No one knows what the reason for the fall was.

None of the witnesses examined had ever seen him open a hopper car but the decedent had been on top of a cinder car several times when these cars were being opened by others. (Tr. 67, 69, 74) It is fair to assume that he must have observed the opening of such cars on many different occasions. Furthermore, on the day in question, when the decedent attempted to open this car, Section Foreman Stone, who had opened many such cars, (Tr. 35), was of the clear opinion that decedent knew how to operate these hopper car pockets with this type of wrench. (Tr. 49) Stone stood along beside the decedent while decedent was engaged in opening this car and had ample opportunity to observe the way he did it. (Tr. 34, 47) Stone says that decedent was not awkward in the way he handled the wrench. (Tr. 47) Stone did not have to instruct him what to do, (Tr. 47-48), and, generally, the decedent seemed perfectly familiar with that operation. (Tr. 48)

The frog wrench is used for a variety of purposes by the sectionmen and is a part of the standard equipment for their work. (Tr. 73, 78-79, 133, 136-137) It has been in common usage on the section for many years. (Tr. 39, 42, 70, 75, 78-79, 133, 136-137) It has been used for years to open the hoppers of these cars. (Tr. 80, 138) It has been entirely satisfactory for that purpose. (Tr. 39, 80, 138) The Section Foremen have never complained about the inconvenience of this tool. (Tr. 134) A strong man can and does successfully hold the weight of the hoppers with

this wrench without letting go of the wrench and permitting the hoppers to open under their own weight. (Tr. 58) A one-armed man can and does open these hopper cars with this wrench. (Tr. 136) In all the years that this type of wrench has been used to open hopper cars, no one has ever been hurt in this kind of an operation. Section Foreman Fumagalli, who has been a sectionman for twenty-four years, testified that he never knew of anyone getting hurt with one of these wrenches while opening a hopper car. (Tr. 136, 138) Sectionman Pratt, who has been in the service for thirteen years, testified that he never knew of anyone getting hurt while operating a hopper car with one of these wrenches. (Tr. 75) Sectionman Bleu, who has been in the service for thirteen years, testified to the same thing. (Tr. 60) Section Foreman Stone, who has been in the service twenty-one years, also testified that he never knew of any one getting hurt while performing this operation with this type of wrench. (Tr. 39)

In undertaking to do this job without any instruction from anybody so to do, the decedent violated a company rule made for his protection. It is undisputed that there was a custom among sectionmen that the older men in the service open these hopper cars. (Tr. 73) The decedent was the youngest man in service in the crew. (Tr. 63) The decedent had been working on the section for six years, (Tr. 63) which was a sufficient length of time to enable him to know the custom of the sectionmen in this regard. Since Muir, from whom the decedent took the wrench, did not know the decedent (Tr. 95) and did not know what the decedent intended to do with the wrench (Tr. 97), and since Stone did not know the decedent (Tr. 33), no one could be charged with any knowledge, except decedent, that he was violating a company rule.

1.

The Alleged Failure to Furnish a Reasonably Safe Place to Work.

It is respectfully pointed out that while this failure to furnish a reasonably safe place to work is asserted here for reversal, there was no evidence produced below to justify that conclusion. The only place where this is mentioned is in Petitioner's argument before the trial Court on Respondent's motion for a verdict. (Tr. 111) Respondent therefore claims that no issue has been raised on this point because of the failure to introduce any evidence regarding the safety of the place of work.

Furthermore, it is a matter of common knowledge that the duty of a sectionman is to maintain the right of way and roadbed. It is also a matter of common knowledge that the roadbed is found upon solid ground in some places and has to be carried over highways and streams in other places. The duty of a sectionman is to maintain the right of way and roadbed wherever he finds them, whether upon solid ground or upon structures.

No employment is free from danger, nor is there any guarantee that the place of work on railroad right of way will be absolutely safe.

Missouri Pacific Co. v. *Aeby*, 275 U. S. 426;
Toledo, St. Louis, etc. Co. v. *Allen*, 276 U. S. 165.

Furthermore, this Court has properly given to railroad engineers considerable latitude for the exercise of their scientific judgment in the construction of railroad facilities. This Court said in *Delaware, etc. R. R.* v. *Koske*, 279 U. S. 7 at page 11:

> "Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice

> of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and drainage systems therein to the uncertain and varying judgment of juries."

There is nothing in this Record to show that this bridge is of any other than standard construction upon which sectionmen work every day of their lives. As the Supreme Court of Vermont noted (R. 5, folio 6) cinders had been dumped at this place on many prior occasions by this same method without accident. Certainly these frog wrenches had been used to open cinder cars safely from time immemorial, (Tr. 80, 138), and no one had ever been hurt in so doing. (Tr. 136, 138)

It must be admitted, therefore, that the place where decedent undertook this work was not unsafe per se. If it was unsafe at all, it must be only because this particular decedent undertook the work there. The evidence shows conclusively that the place where this decedent stood was not "furnished" to this decedent by Respondent. The custom heretofore spoken of, (Tr. 73) constitutes a rule for the protection of employees like decedent. Decedent therefore placed himself in a position of peril, if indeed it was that, in violation of a safety rule made for his protection.

This Court has spoken with clarity of the legal position of an employe who is injured while engaged in activities forbidden by safety rules. In *Unadilla Valley Ry.* vs. *Caldine*, 278 U. S. 139, the Court said at page 142:

> "He, (plaintiff) cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it when the disobedience was brought about and intended to be brought about by his own acts."

In the case at bar, this particular operation had been safely performed at this particular place many times before

(Tr. 41-42). The Record therefore affirmatively contradicts the charge that the place itself was unsafe. It follows that the Petitioner's claim must be narrowed to the safety of the place of work for this particular employee.

Because of the company rule (Tr. 73) which forbade Petitioner's decedent to work in this place, no claim can be based upon results flowing from a disobedience of that rule. Not only was this place of work not furnished to decedent, but the custom of work prevented his presence there. If the decedent chose to disregard company measures taken for his protection, the Petitioner cannot complain of injuries following such violations.

It is submitted that the Record fails to sustain the charge that this place was unsafe or that it was furnished as a place of work for this decedent.

2.

The Alleged Failure to Supply the Decedent With Proper Tools.

We agree with your Petitioner that the employer has a duty to furnish his employee with reasonably safe tools and appliances and that this duty does not require that the tools furnished shall be of the latest, best or safest quality. If the tools are reasonably safe and adequate, the employer's duty has been fulfilled.

Before discussing the adequacy of the frog wrench, may we respectfully call the Court's attention to the charge that the frog wrench was "furnished" to this decedent. The evidence was uncontradicted that there was no one on the job that day who had any authority to give instructions to the decedent. The decedent's Boss was Morello (Tr. 61) who was absent that day (Tr. 63). Section Foreman Stone, who assisted decedent, was not Bailey's boss and had no authority over him (Tr. 33, 38). Stone did not order dece-

dent to get the wrench nor to open the hopper car (Tr. 58). In fact, Stone did not know who decedent was and had never seen him before (Tr. 33). Sectionman Muir, from whom decedent demanded the frog wrench (Tr. 96), was not decedent's boss and had no authority over him (Tr. 99). Decedent did not explain to Muir why he wanted the wrench nor did Muir ask the decedent to take the wrench or order him to do so (Tr. 99).

It appears that another type of wrench was available to sectionmen, which was called a Swaco Safety wrench (Tr. 86) and the claim is that this is the wrench which should have been used (Tr. 132). The claim is that the employer furnished the frog wrench instead of this Swaco ratchet wrench, and thereby was negligent.

The Record does not show whether among the tools available on that day was a Swaco ratchet wrench. All we know is that this type of wrench had been procured and assigned to the use of the sectionmen. For all that appears, the Swaco wrench may have been with the other tools when the decedent made his choice of the instrument that he did. That being so, no claim can be made that improper tools were furnished. The employer made available to sectionmen both types of wrenches. If decedent deliberately ignored the ratchet wrench and selected the frog wrench, Petitioner cannot claim that the employer failed to make available the proper tool for this work. The burden of proof is upon the Petitioner. There is no proof which will sustain the argument that an improper tool was furnished, in a legal sense.

But assuming that this Court finds there is evidence that no such ratchet wrench was made available to the decedent, may we respectfully call the attention of the Court to the complete adequacy of the frog wrench. The frog wrench was standard equipment among sectionmen (Tr. 73, 78-79,

133, 136-137). It had been in common use on the Section for many years (Tr. 39, 42, 70, 57, 78-79, 133, 136-137). It had been used for years to open the hoppers of these cars (Tr. 80, 138). It had been completely satisfactory for all purposes (Tr. 39, 80, 138). A one-armed man could open these hopper cars with this wrench (Tr. 136). One Section Foreman who had worked on the Section for twenty-four years testified he had never known of any one getting hurt while opening a hopper car with one of these wrenches (Tr. 136, 138). Another sectionman who had worked on the Section for thirteen years testified he had never heard of any one getting hurt while opening a hopper car with one of these wrenches (Tr. 75). Another Sectionman who had been in the service for thirteen years testified the same thing (Tr. 60). A Section Foreman who had worked on the Section for twenty-one years testified to the same thing (Tr. 39). This long history of safety in the use of this frog wrench by Sectionmen to perform this work is a sufficient answer to the charge of furnishing adequate tools for this work. Admitting, as the Petitioner does, that the employer need not furnish the latest and most improved tools, it is submitted that this frog wrench was entirely adequate for the purposes intended by the decedent.

The argument is made that the Swaco ratchet wrench was more appropriate and safer than the frog wrench. The evidence denies this without contradiction. The word "safety" which appears in the manufacturer's name for the ratchet wrench, is a mere trade name, as counsel freely admitted at the trial. Counsel was asked if he claimed anything for the word "safety" when the Swaco Safety wrench was offered and he said that he did not (Tr. 122). Counsel for Petitioner was asked later by the Court as follows:

> "Mr. Lawson, do you expect to prove that this (Swaco) wrench is a much safer wrench than the

> other? You just offer the wrench, or do you offer a line of proof in connection with it (Tr. 124)?

to which counsel for the Petitioner answered:

> "Well, if the Court please, I doubt that under all the circumstances with which the plaintiff is faced that we can show the actual use of this wrench, this particular wrench. I have no way of determining who has used it" (Tr. 124).

Subsequently the Court said to counsel for the Petitioner:

> "You just offer the tool (Swaco wrench) that is all?"

to which Petitioner's counsel replied:

> "That is all, with our claim as I stated" (Tr. 124).

It will thus be seen by this admission of Petitioner's counsel that the Swaco ratchet wrench is not safer nor is any claim made about this. Counsel frankly admitted his inability to prove that the wrench which he claimed should have been furnished was in fact any safer than the wrench which was used. Counsel's admission in that regard is fortified by the testimony of a sectionman who had used both types of wrenches that the use of the ratchet wrench produces certain dangers which have to be carefully guarded against (Tr. 60).

It is therefore respectfully submitted that not only is there nothing in this Record to show that the ratchet wrench was any safer than the frog wrench, but that the Record affirmatively shows, and Counsel admits, that petitioner cannot prove the superiority of the one over the other. In these circumstances, obviously the Petitioner, upon whom the burden of proof rests, has failed to make a case.

3.

The Alleged Failure to Instruct the Employee Concerning the Use of the Frog Wrench.

We are dealing here with an ordinary type of wrench similar to other wrenches in common use by people in all walks of life, with the exception that this wrench is longer than is ordinarily used by such people. The length of this wrench is not formidable to a Sectionman who has been using such an instrument every day of his work. There is nothing intricate or technical in its construction. The law is well settled that no instruction on the use of simple tools is required. The case at bar is completely identical with *Ristucci* v. *Norfolk & W. Ry. Co.*, 60 F. (2) 28, where a recovery was denied by the Circuit Court of Appeals in precisely the same circumstances as comprise the instant case. The Court there held that under the Federal Act there was no duty to instruct an employee in the use of simple tools. But even if a duty to instruct could be interpolated into this case, we claim that the decedent had had sufficient instruction. He had watched these hopper cars being opened by the use of the frog wrench on many occasions (Tr. 67, 69, 74). When decedent demanded the frog wrench from Muir and walked out onto the bridge to open this car, Section Foreman Stone stood beside him and watched the decedent's preparation for this work (Tr. 34, 47). Stone, who had no authority over decedent, and did not know what his experience was (Tr. 33, 38), was impressed with the expertness with which decedent went about his work (Tr. 48). Stone, himself, was an expert at this work and was in a position to see whether or not decedent needed any instruction. Stone testified that decedent needed no instruction since he was thoroughly familiar with the manner in which this work should be done (Tr. 47-49). However, Stone

did caution the decedent notwithstanding the ability which the latter showed (Tr. 35), and decedent acknowledged the warning (Tr. 40).

It thus appears that the charge of failure to instruct is unwarranted. When men act at their work in such an expert manner as was the case here, obviously the employer need not give detailed instruction on the use of simple tools which are being handled in such a workmanlike manner. This Respondent had no notice of any kind of any defective education on the part of decedent to perform this work. Decedent's actions to a trained observer would indicate the utmost familiarity with the job at hand.

It is therefore respectfully submitted that the charge of failure to instruct cannot be sustained.

4.

The Legal Effect of Decedent's Own Negligence.

It is admitted that under the Federal Employers' Liability Act, contributory negligence is not a bar to recovery but goes only to diminish the damages. However, this Court has frequently held that there are cases where the negligence of the Plaintiff will defeat recovery completely, even though there may be some negligence by the defendant present. In instances where this Court has denied recoveries in cases of contributory negligence, it has been because the plaintiff's own negligence was active and proximate, while the negligence of the defendant was passive and non-operative.

The proposition is well stated in *L. & N. R. R.* v. *Davis*, 75 F. (2) 849 at page 851:

> "It has long been settled in this Court, following Great Northern Ry. Co. *v.* Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732, that even in the presence of the defendant's negligence, plaintiff's own conduct may be such as to become the sole proximate cause of the injury" (Citing cases).

In the Great Northern case cited above, the Supreme Court began a long line of decisions to that same effect. The Court there found that both parties were negligent, but that the negligence of the plaintiff was the cause of the injury. In these circumstances, the Court said at page 448:

> "There is no justification for a comparison of negligence or an apportionment of their effect."

This case was followed in the same Court by *Frese* v. *C. B. & Q. R. R.*, 263 U. S. 1, where the Court said at page 3:

> "Whatever may have been the practice, he (the plaintiff) cannot escape his duty, and it would be a perversion of the Employers' Liability Act * * * to hold that he could recover for an injury proximately due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

Again, in *Davis* v. *Kennedy*, 266 U. S. 147, the Court said at page 148:

> "It seems to us a perversion of the statute to allow his (plaintiff's) representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

Again, in *Unadilla Valley Ry.* v. *Caldine*, 278 U. S. 139, the Court said at pages 141-142:

> "In our opinion he (plaintiff) cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

The Circuit Courts of Appeal have recognized the compelling force of this rule and have universally applied it.

L. & N. R. R. v. *Davis* (*supra*).
Pierre Marquette v. *Haskins*, 62 F. (2) 806.
Southern Ry. v. *Hylton*, 37 F. (2) 843.

Applying the above rules to the case at bar, we find that the Respondent's negligence, if any, was of a passive character. It created a mere condition. It was non-operative in a legal sense at the time the decedent attempted to open the hopper car. The decedent's participation, on the other hand, was active right up to the moment of injury. If he had the improper tool, as the Petitioner contends, if he went without orders to a place of danger, as the Petitioner contends, if he attempted to open the hopper car without previous instruction how to do so, as the Petitioner contends, that line of conduct was a conscious negligent act by him and the proximate cause of the result.

We do not contend that this is assumption of risk because we recognize the legal effect of this Court's decision in *Tiller* v. *Atlantic, etc. R. R.*, No. 296, October Term, 1942. Assumption of risk does not depend upon negligence but depends upon the maxim *volenti non fit injuria*. The argument advanced here is that this conduct by the decedent was negligent and that it was the sole proximate cause of the result, in spite of the alleged presence of passive negligence on the part of the defendant.

It is therefore respectfully submitted that in these circumstances:

> "There is no justification for a comparison of negligence or the apportioning of their effect." G. N. Ry. v. Wiles, 240 U. S. 444.

5.

The Alleged Negligence of the Respondent Is Not Related to the Accident.

It is well established in this Court that actions under the Federal Employers Liability Act must fail unless the plaintiff can prove that the accident resulted at least in part from the negligence of the defendant. It is admitted that the burden is upon the plaintiff to prove negligence and causal connection. In *Atchison, etc. Ry.* v. *Saxon*, 284 U. S. 458, this Court said at page 459:

> "As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this (accident) and the injury."

It therefore results that where an accident may have happened from one of several causes, for some of which the Defendant is liable and for some of which it is not, and the evidence does not show clearly which cause produced the result, there can be no recovery. The reason behind this rule is that in such event, the Plaintiff has failed to prove the causal connection between the alleged negligence and the result. The United States Supreme Court many years ago was confronted with this situation in *Patton* v. *Texas, etc. R. R.*, 179 U. S. 658, and said at page 663:

> "The fact of the accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence * * *. It is not sufficient for the employee that the employer may have been guilty of negligence,—the evidence must point to the fact that he was. Where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have

> brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Again, in *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486, the Court had under consideration a similar situation under this same Act, and said, at page 490:

> "The utmost that can be said is, that the accident may have resulted from any one of several causes, for some of which the company was responsible and for some of which it was not. This is not enough."

Again, in *Atchison, etc. R. R.* v. *Toops*, 281 U. S. 351, the Court said at pages 354-355:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers Liability Act. The negligence complained of must be the cause of the injury. The jury will not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

There were only two men in a position to see what happened. One was Sectionman Lashua and the other was Section Foreman Stone. Lashua was not asked the question of what caused decedent to fall from the bridge and consequently gave no information (Tr. 22). Section Fore-

man Stone stood beside decedent when he fell (Tr. 37). Stone first said that he did not know whether decedent had his hands on the wrench or not when he fell (Tr. 37). Then Stone said that decedent must have had the wrench in his hands but "whether the wrench was what threw him over, I couldn't say, because I was watching the nut on the car"(Tr. 38). Stone further said "I couldn't tell what made him (decedent) go off the bridge" (Tr. 38).

It appears therefore from the Record that there is not the slightest evidence to connect any alleged negligence of this defendant with the result. The decedent may have slipped, he may have lost his balance, he may have had a dizzy attack. The Record is silent, and the Petitioner has failed to prove the causal connection between the alleged negligence and the accident, as the decisions of this Court require.

6.

It is therefore respectfully submitted that, viewing the evidence as a whole and in the light most favorable to the Petitioner, the proof fails to sustain the cause of action. It is therefore further submitted that the decision of the Supreme Court of Vermont is correct and should be affirmed.

Dated this 29th day of March, 1943.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1942.

Florence J. Bailey, as Administratrix of Bernard E. Bailey, Petitioner, *vs.* Central Vermont Railway, Inc. } On Writ of Certiorari to the Supreme Court of the State of Vermont.

[May 24, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This action was brought under the Federal Employers Liability Act (45 U. S. C. § 51) in the state courts of Vermont to recover damages for the death of Bernard E. Bailey, one of respondent's employees. At the close of all the evidence respondent moved for a directed verdict. The Court denied the motion and submitted the case to the jury which returned a verdict for petitioner. On appeal the Supreme Court of Vermont reversed, by a divided vote, holding that the motion for a directed verdict should have been granted because negligence was not shown. — Vt. —. The case is here on certiorari.

Bailey had worked for respondent as a sectionman for about five years. On the day in question—May 14, 1940—he went to work on a work train to a point on the road in Williston, Vt., where he and other members of the crew unloaded track material to be used on the roadbed. Instructions were then received to unload a car filled with cinders. The evidence of the accident viewed in a light favorable to petitioner was as follows:

The car was pulled onto a bridge over a cattle pass so that the cinders could be dumped through the ties in the bridge floor onto the roadway below. The floor of the bridge was about 18 feet above the ground. The only available footing at the side of the car was about 12 inches wide. Of this space 8 or 9 inches were taken up by a raised stringer, i. e. a timber which lay across the ties and was set in 3 or 4 inches from their ends. There was no guard rail. The cinders to be unloaded were in a hopper car. That type of car has doors in the floor which are closed by a chain which winds up on a shaft running crossways of the car. The doors are opened from the side by one man turning a nut on the

end of the shaft while another disengages from a ratchet a dog which holds the shaft. A wrench is applied to the nut at the end of the shaft, the operator pulls its handle back to relieve the tension on the dog, the other person releases the dog, the operator of the wrench pushes back on it to open the hopper, the weight of the material in the car opens the doors. When the hopper starts to open, the shaft spins, and the operator must disengage the wrench or let go of it, lest he be thrown off balance or knocked down. The wrench used by Bailey was a heavy frog wrench—open jaws and a handle about three feet long. It had been used for many years for that purpose and no one had been injured by it. Bailey certainly was unskilled and perhaps unfamiliar in the opening of hopper cars. No one had ever seen him open one. Such an operation was usually performed by men older in point of service. Bailey had been present on a few occasions when hopper cars were unloaded but usually he was on top of the car at the time. Cinders were dumped at this bridge about once a year. As Bailey walked out on the stringer on the bridge and put the wrench on the nut, the section foreman said, "Be careful the wrench doesn't catch you." Bailey at once pushed on the wrench but the hopper did not open; he gave another push on the wrench, the hopper opened, the nut spun, and Bailey was thrown by the wrench into the roadway below. The hopper car could have been opened before it was moved onto the bridge and any cinders which spilled on the roadbed shoveled onto the roadway beneath the bridge. Or after the cinders had been dumped upon the roadbed a railroad tie could have been utilized as a drag to push cinders from the roadbed to the ground below the bridge.

Bailey died from the injuries resulting from the fall.

There was in our view sufficient evidence to go to the jury on the question whether, as alleged in the complaint, respondent was negligent in failing to use reasonable care in furnishing Bailey with a safe place to do the work.

Sec. 1 of the Act makes the carrier liable in damages for any injury or death "resulting in whole or in part from the negligence" of any of its "officers, agents, or employees". The rights which the Act creates are federal rights protected by federal rather than local rules of law. *Second Employers' Liability Cases*, 223 U. S. 1; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44. And those federal rules have been largely fashioned from the common

law (*Seaboard Air Line Ry.* v. *Horton, supra*) except as Congress has written into the Act different standards. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. —. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. 3 Labatt, Master & Servant (2d ed.) § 917. That rule is deeply engrained in federal jurisprudence. *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, 664, and cases cited; *Kreigh* v. *Westinghouse, C. K. & Co.*, 214 U. S. 249, 256, 257; *Kenmont Coal Co.* v. *Patton*, 268 Fed. 334, 336. As stated by this Court in the *Patton* case it is a duty which becomes "more imperative" as the risk increases. "Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery." 179 U. S. p. 664. It is that rule which obtains under the Employers Liability Act. See *Coal & Coke Ry. Co.* v. *Deal*, 231 Fed. 604; *Northwestern Pac. R. Co.* v. *Fiedler*, 52 F. 2d 400; *Thompson* v. *Boles*, 123 F. 2d 487; 2 Roberts, Federal Liabilities of Carriers (2d ed.) § 807. That duty of the carrier is a "continuing one" (*Kreigh* v. *Westinghouse & Co., supra*, p. 256) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.

The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co., supra*) as well as issues involving controverted evidence. *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572. To withdraw such a question from the jury is to usurp its functions.

The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence." *Jacob* v. *New York*

City, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

Since the evidence of respondent's negligence in failing to provide Bailey with a safe place to work is sufficient to support the verdict of the jury and the judgment of the trial court, we do not reach the other issues which have been presented by petitioner.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1942.

Florence J. Bailey, as Administratrix of E. Bailey, Petitioner, vs. Central Vermont Railway, Inc. } On Writ of Certiorari to the Supreme Court of the State of Vermont.

[May 24, 1943.]

Mr. Justice Roberts.

I am of opinion that this case is one of a type not intended by Congress to be brought to this court for review. Actions under the Federal Employers Liability Act constitute but one category of the great total of actions triable in Federal District Courts and in the courts of the forty-eight states which may come to this court. While the legal principles binding alike on court and jury in such actions are, for the most part, settled, the complexes of fact to which these principles are applicable rarely are identical in any two litigations. If, in every case where, peradventure, this court might differ from a lower court in appraising the legal effect of the proofs adduced by plaintiff or defendant, we independently review the facts to determine whether there was evidence for a jury's consideration, we shall reverse a course founded in over fifty years of history.

While a litigant has no constitutional right of appellate review, Congress has seen fit to grant it. And, until 1891, this court was, with negligible exceptions, the only instrument of such review. The increasing volume of our appellate work bade fair to render the court incompetent to give needed consideration to important cases which the public interest required that it decide. To preserve the privilege of appellate review, and to provide an appellate tribunal where most federal litigation should end without resort of this court, Congress created the Circuit Courts of Appeals.[1] The relief thus afforded this court prevented the substantial breakdown of our appellate function. But the relief proved insufficient, and Congress continued to adopt means to render it possible for

[1] Act of March 3, 1891, 26 Stat. 826.

us to do the indispensable work of the court. In 1915 it made the judgments of Circuit Courts of Appeals final in certain classes of cases arising in Puerto Rico and Hawaii, and also in bankruptcy cases, subject, as to the latter, to our discretionary power to take cases involving important questions.[2] The House Committee in its report said as to the objects of the bill:[3]

"Relieving the Supreme Court of the United States from the necessity of reviewing such cases from the Supreme Courts of Porto Rico and Hawaii as involve no Federal question, but depend entirely upon the local or general law. Under the law as it now stands the decisions of the Supreme Courts of Porto Rico and Hawaii are reviewable by the Supreme Court of the United States not only when some Federal right is in controversy, but also in all cases which involve more than $5,000. without respect to the character of the questions involved. This section as amended includes Porto Rico with Hawaii and continues the existing right to review in the Supreme Court when Federal rights are in controversy, but leaves all other cases to be dealt with upon a petition for a writ of certiorari, as is now the law with respect to most of the cases in the circuit court of appeals."

The great mass of litigation in state and federal courts arising under the Employers Liability Act and railway safety appliance legislation still could be brought to this court as of right under existing law.[4] In 1916 Congress abolished the right and made the judgments of state appellate courts and Circuit Courts of Appeals final in this class of cases, subject to our discretionary review.[5] The Senate Committee report on the bill was entitled "Relief of the Supreme Court", and to it was appended a memorandum prepared by the clerk of this court exhibiting the congested state of our docket.[6] Finally, in 1925, Congress dealt in the same fashion with all litigation sought to be brought here for review from state and federal tribunals, save for certain narrowly restricted classes.[7]

Without the benefit of this restriction of its obligatory jurisdiction this court could not have attained the end and aim of its creation. But there remains the constant danger that, by taking

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[2] Act of January 28, 1915, 38 Stat. 803.

[3] H. R. No. 847, 63d Cong., 3d Sess.

[4] Southern Ry. Co. v. Crockett, 234 U. S. 725.

[5] Act of Sept. 6, 1916, c. 448, 39 Stat. 726, § 3. See Andrews v. Virginian Ry. Co., 248 U. S. 272.

[6] S. R. No. 775, 64th Cong., 1st Sess. See also the House Report No. 794, 64th Cong., 1st Sess.

[7] Act of February 13, 1925, 43 Stat. 936.

cases lying outside defined areas of importance, the court will limit its ability adequately to deal with those which all will agree it must adjudicate.

And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed. The instant case plainly belongs in the class last mentioned. All members of the Supreme Court of Vermont agreed upon the controlling legal rule. They sharply and almost evenly divided on the question whether the plaintiff's evidence brought her case within that rule. What they decided, and what we decide, can add nothing to the body of jurisprudence. And it is irrelevant to the question of our exercise of the power of review that if we had been charged with the responsibility of a trial judge or a member of the court below, we might have held the case one for submission to a jury.

In almost every litigation the parties are afforded hearings in at least two courts. This was true here, the appellate court being the supreme court of the state of the parties' residence. If, in such a case, we accord a third hearing, whenever we should have applied the law differently, we shall have little time or opportunity to do aught else than examine the claims of plaintiffs and defendants that, in the special circumstances disclosed, prejudicial errors have been committed in the admission of evidence, in rulings of law, and in charges to juries.

There is no reason why a preference should be given, in these respects, to actions instituted under the Federal Employers Liability Act, over others founded on other federal statutes, over contract cases, or admiralty cases, where a failure properly to rule on the facts is asserted to have wrought injury to one of the parties.[3]

It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. I merely state my conviction that the Seventh Amendment envisages trial

[3] See the dissent in Deputy v. Du Pont, 308 U. S. 488, 499.

not by jury, but by court and jury, according to the view of the common law, and that federal and state courts have not usurped power denied them by the fundamental law in directing verdicts where a party failed to adduce proof to support his contention, or in entering judgment notwithstanding a verdict for like reason. But this I do say, that this court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government.

Finally, I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence.

Mr. Justice FRANKFURTER joins in this opinion.

Mr. Chief Justice STONE.

I agree with Mr. Justice ROBERTS that the present case is not an appropriate one for the exercise of our discretionary power to afford a second appellate review of the state court judgment by writ of certiorari. But as we have adhered to our long standing practice of granting certiorari upon the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided.